

Turning first to the applied Callan et. al. '038 reference, the Applicant respectfully submits, in accordance with the regulations of the MPEP, the cited reference of Callan et. al. '038 is only an effective prior art citation as of its publication July 17, 2003 date and not as of its January 14, 2003 filing date. In particular, it is noted that the Examiner is only citing the July 17, 2003 publication of Callan et al. '038 and not any corresponding United States Patent of that reference. The reason for this is that Callan et al. '038 apparently never issued as a United States Patent and so, it is respectfully submitted, that Callan et al. '038 is precluded from being an effective prior art reference, under 35 U.S.C. § 103(a), as of its January 14, 2003 filing date. Rather, Callan et al. '038 is only an effective reference as of its July 17, 2003 publication date.

According to § 2127 of the MPEP:

*An abandoned patent application may become evidence of prior art only when it has been appropriately disclosed, as, for example, when the abandoned patent [application] is reference[d] in the disclosure of another patent, **in a publication**, or by voluntary disclosure under... 37 CFR 1.139.... An abandoned patent application becomes available as prior art only as of the date the public gains access to it. [Emphasis added]*

Upon reviewing the United States Patent and Trademark Office records, it appears that the Callan et. al. '038 became abandoned as of November 20, 2006. In view of such abandonment, it is respectfully submitted that Callan et. al. '038 can only be effective prior art, under 35 U.S.C. § 103(a), as of its July 17, 2003 publication date, namely, *the date the public gains access to it.*

While the January 14, 2003 filing date of Callan et. al. '038 is before the filing date of the above identified application, the July 17, 2003 publication date of Callan et. al. '038 is after the claimed and perfected May 30, 2003 priority date of GB 0312343.7. It is respectfully submitted that the presently claimed invention is embodied in the disclosure of GB 0312343.7, filed May 30, 2003, so that the subject matter of the presently claimed invention, of the above identified application, is entitled to the May 30, 2003 priority date, which date predates the effective July 17, 2003 publication date of Callan et. al. '038 (see enclosed marked version showing the differences between the disclosure of PCT/GB2004/002242 and the disclosure of GB 0312343.7). As such, it is respectfully submitted that Callan et. al. '038 was not available "at the time the invention was made" and is no longer a proper citation. See 35 U.S.C. § 103(a).

In further support of the Applicant's position, the Examiner's attention is drawn to § 2141.01 of the MPEP which states:

*A 35 U.S.C. 103 rejection is based on 35 U.S.C. 102(a), 102(b), 102(e), etc. depending on the type of prior art reference used and **its publication or issue date.** [Emphasis added]*

It is respectfully submitted, in support of the cited sections of the MPEP, that Callan et. al. '038 can only possibly be an effective prior art reference as of *its publication or issue date*, namely, its July 17, 2003 publication date (as noted above, this reference never issued as a United States Patent)--not as of its January 14, 2003 filing date.

According to § 2136.02 of the MPEP, the Supreme Court held a *U.S. Patent* may be used as of its filing date to show obviousness. See *Hazeltine Research v. Brenner*, 382 U.S. 252 (1965). However, Callan et. al. '038 is not an issued United States Patent and thus, § 2136.02 of the MPEP does not apply to Callan et. al. '038. In view of the foregoing, it is respectfully submitted that Callan et. al. '038 is not effective prior art as of its January 14, 2003 filing date but only as of its July 17, 2003 publication date.

Now turning to the base reference of Brown '416, it is respectfully submitted that Brown '416 only pertains to a lift truck comprising *four wheels, each driven individually by respective hydraulic motors*, but Brown '416 does not pertain to a lift truck having *three wheels including two undriven rear wheels and a front wheel driven by a hydraulic motor*. That is, Brown '416 fails to in any way to teach, suggest, disclose or remotely hint at the use of only three wheels in which only the front wheel is driven by a hydraulic motor, as presently claimed.

As Brown '416 fails to in any way to teach, suggest, disclose or remotely hint at the above distinguishing features of the presently claimed invention, and as Callan et. al. '038 is no longer an effective reference, under 35 U.S.C. 103(a), in view of the claimed and perfected priority claim to GB 0312343.7 filed May 30, 2003 (Callan et. al. '038 was only published on July 17, 2003), it is respectfully submitted that the applied combination of Brown '416 and Callan et al. '038 should be withdrawn at this time. In view of the foregoing, it is respectfully submitted that this application is now placed in a condition for allowance. Action to that end, in the form of an early Notice of Allowance, is courteously solicited by the Applicant at this time.

In view of the above amendments and remarks, it is respectfully submitted that all of the raised rejection(s) should be withdrawn at this time. If the Examiner disagrees with the Applicant's view concerning the withdrawal of the outstanding rejection(s) or applicability of the Brown '416 and/or Callan et al. '038 references, the Applicant respectfully requests the Examiner to indicate the specific passage or passages, or the drawing or drawings, which contain the necessary teaching, suggestion and/or disclosure required by case law. As such

10/555,921

teaching, suggestion and/or disclosure is not present in the applied references, the raised rejection should be withdrawn at this time. Alternatively, if the Examiner is relying on his/her expertise in this field, the Applicant respectfully requests the Examiner to enter an affidavit substantiating the Examiner's position so that suitable contradictory evidence can be entered in this case by the Applicant.

The Applicant respectfully requests that any outstanding objection(s) or requirement(s), as to the form of this application, be held in abeyance until allowable subject matter is indicated for this case.

In the event that there are any fee deficiencies or additional fees are payable, please charge the same or credit any overpayment to our Deposit Account (Account No. 04-0213).

Respectfully submitted,



Michael J. Bujold, Reg. No. 32,018
Customer No. 020210
Davis & Bujold, P.L.L.C.
112 Pleasant Street
Concord, NH 03301-2931
Telephone 603-226-7490
Facsimile 603-226-7499
E-mail: patent@davisandbujold.com